

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

B P / S

74-1724

To be argued by
ROBERT GOLD

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1724

UNITED STATES OF AMERICA,

Appellee,

—v.—

CAMILLO RIZZUTO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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UNITED STATES OF AMERICA,

Appellee,

—v.—

CAMILLO RIZZUTO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Camillo Rizzuto appeals from a judgment of conviction entered on March 19, 1974 in the United States District Court for the Southern District of New York after a trial before the Honorable Charles L. Brieant, Jr., United States District Judge, sitting without a jury.

Indictment 72 Cr. 1014, filed on September 13, 1972, charged the appellant and four co-defendants in two counts with violations of the federal narcotics laws.* Count One charged all five defendants with conspiring to possess and distribute heroin in violation of Title 21, United States Code, Section 846. Count Two charged that on May 9, 1972 the appellant and co-defendant Anthony Castiglione

* 72 Cr. 1014, reproduced as Government's Appendix A, superseded Indictment 72 Cr. 620 which named only Rizzuto and Castiglione.

possessed approximately 13 kilos of heroin with the intent to distribute them in violation of Title 21, United States Code, Sections 841(A)(1), 841(B)(1)(a) and Title 18, United States Code, Section 2.

The trial commenced on October 29, 1973. By written opinion dated March 19, 1974, Judge Briant found Rizzuto guilty on both counts and sentenced him to concurrent four year terms of imprisonment to be followed by a special parole term of three years. Rizzuto is presently free on a \$25,000 personal recognizance bond secured by \$2,500 cash pending the outcome of this appeal.*

Statement of Facts

A. The Government's Case

At approximately 2:00 P.M. on April 28, 1972, Special Agent John O'Neill of the Drug Enforcement Administration (formerly known as the Bureau of Narcotics and Dangerous Drugs, "BNDD"), acting upon information supplied by an informant and accompanied by agents of the United States Bureau of Customs, intercepted and seized from the baggage carousel at John F. Kennedy International Airport a black leather suitcase which had arrived on a TWA flight from Paris. The suitcase bore the brand name "Lancel" and was further identified by a baggage tag in the name of John O'Neill. Through the use of a marquis reagent, a "field" test indicated the presence of opiates in the 26 clear plastic bags contained in the suitcase. Accord-

* The defendant Anthony Castiglione was released on \$100,000 bail on July 6, 1972. His present whereabouts are unknown. An indictment charging him with failure to appear after release upon bail (Title 18, United States Code, Section 3150) has been filed under Indictment 73 Cr. 677 on June 12, 1973. An Order of Nolle Prosequi was entered as to Vito Adamo who is deceased. Defendants Orsini and Mendolia, resident aliens of Canada, are presently in custody there awaiting trial on separate subsequent narcotics charges.

ingly, the suitcase and its contents were turned over to the BNDD for safekeeping (Tr. 11-17, 19, 31-33).*

On April 29, a French police officer, Chaminadas, assumed the role of a French heroin distributor in order to infiltrate an international smuggling operation and to identify as many of its operatives as possible. On April 29th and May 1st, while in the company of an informant, Chaminadas spoke by telephone from the Holiday Inn in Manhattan to Montreal, Canada with persons who identified themselves as Guido Orsini and Santo Mendolia. Acting on instructions from Orsini and Mendolia, Chaminadas twice went to meet their connection. First they directed him to carry a red jacket over his arm and the second time they told him to carry a yellow towel for identification purposes. On neither occasion, however, did anyone meet with him (Tr. 38, 40-45).

On May 2nd after several telephone conversations with Orsini and Mendolia, Chaminadas was told that because there was too much activity at the Holiday Inn he should move to the Sheraton Motor Inn. From his room at the Sheraton, Chaminadas again spoke with Orsini and Mendolia who told him to meet their "friend" on Pier 83 at 43rd Street and Twelfth Avenue in Manhattan on May 2nd at 7:00 P.M. Chaminadas testified that in the course of some 20 to 25 telephone conversations with Orsini and Mendolia, Orsini had stated that the selling price for the heroin was \$10,000 per kilo and that Orsini's man would give Chaminadas \$130,000. Thus, Orsini knew that 13 kilos of heroin had been shipped from France and were then in Chaminadas' possession although Chaminadas had never mentioned either the quantity or the price of the heroin which he had for sale (Tr. 45-49).

* Government's Exhibits 2 and 4 in evidence. "Tr." refers to Transcript of Trial.

At about 7:00 P.M. on May 2, 1972, Chaminadas met with one Vito Adamo on Pier 83 and discussed the sale and delivery of the heroin. Adamo told Chaminadas that they would meet again at 9:00 in the Sheraton bar. After Adamo left Chaminadas on the pier, surveillance agents saw him meet with Castiglione. Later that evening, surveillance agents also saw Castiglione seated in a green BMW automobile owned by Rizzuto (Tr. 50-54, 94-95, 106, 141, 147, 155-156). At 9:00 P.M. Adamo and Chaminadas met at the Sheraton bar according to plan but were unable to make a deal. At about 4:15 A.M. on May 3, Adamo told Chaminadas to switch hotels to determine whether Chaminadas was being followed (Tr. 50-59, 78-80).

At noon on May 3, after another telephone conversation with Orsini in Canada, Chaminadas met with Adamo in the lobby of the Hotel Americana in Manhattan. Adamo said that a friend of his would rent a room there and would receive the money and turn it over to Adamo who would then purchase the heroin from Chaminadas. Later that day, however, Adamo again met with Chaminadas and said that the deal was off because he could not get the money. He cautioned Chaminadas to stay in touch with Orsini and Mendolia. Chaminadas told Orsini and Mendolia that he was going back to France because they could not do business (Tr. 59-60).

On May 8, 1972, Chaminadas again registered at the Sheraton Motor Inn. In accordance with instructions from Orsini and Mendolia, he then left the hotel with a French newspaper under his arm to meet "a friend" on Pier 83. At approximately 8:50 P.M., Chaminadas met with an individual who called himself "Tony" and who was later identified as Anthony Castiglione. Chaminadas recalled that "Tony" had been with Adamo on May 2. Castiglione accompanied Chaminadas to Room 1132 at the Sheraton. There Chaminadas permitted Castiglione to remove a sample of the heroin from the "Lancel" suitcase and told

Chaminadas that he would have to show the sample to "his people." Chaminadas testified that Castiglione then outlined the following plan: he would rent a room in the Sheraton; "his friend" would rent a third room there and would have a girl with him; his friend would then receive the money and call Castiglione's room and give him the money for transfer to Chaminadas. Later, Castiglione told Chaminadas that he had registered in Room 1525 at the Sheraton (Tr. 62-66, 110-111, 118-120).

Just before noon on May 9, 1972, Camillo Rizzuto, the appellant, registered in Room 1005 (a single room) under the name Vincenzo Columba (Tr. 81-84). At about noon Castiglione called Chaminadas and asked him to come to Room 1525 because he was expecting a telephone call from Canada. Chaminadas went to Room 1525 and had a telephone conversation with Guido Orsini in Canada. Orsini told Chaminadas that Castiglione would produce the money and, as a sign of good faith, was prepared to give a deposit of \$20,000 of his own money. After the call, Chaminadas returned to his own room (Tr. 66-67, 11, 112, 121-129).

At approximately 1:00 P.M. that day Rizzuto was observed entering Castiglione's room. He came out of the room about ten minutes later and went directly to Room 1005, the room in which he had registered under the name of Vincenzo Columba (Page 112-113, 121). Shortly after Rizzuto left Castiglione's room, Chaminadas returned. At approximately 2:05 P.M. Rizzuto was again observed (and recorded on video tape) leaving Room 1005 and returning to Room 1525. He apparently left the room later unobserved (Tr. 66-67, 112-114, 121, 129). At about 4:00 P.M. Castiglione came to Chaminadas' room and said that the money was coming from Brooklyn and would arrive at about 9:30 that night. Castiglione then returned to his room (Tr. 68-69).

Shortly before 9:00 P.M. on May 9, 1972 Special Agent Michael Pavlick went to the tenth floor of the Sheraton

and saw Castiglione about ten feet from Rizzuto's room carrying a small black attache case. Castiglione then entered the elevator and Pavlick lost sight of him. Pavlick testified that there was only one other room in the immediate vicinity of Rizzuto's (Tr. 97-98, 104). Seconds later Castiglione was seen on the eleventh floor walking down the hall away from the elevator toward Chaminadas' room, carrying a small black leather attache case. He placed it on the bed, opened it, and counted out \$122,000. Castiglione assured Chaminadas that the remaining \$8,000 would be paid by Orsini and Mendolia. Chaminadas agreed to the arrangement and took Castiglione across the hall to Room 1134 where the "Lancel" suitcase containing 13 kilos of heroin had been stored under the continuous surveillance of special agents. Chaminadas handed the suitcase to Castiglione who then left the room, walked toward the elevator on the 11th floor out of Chaminadas' sight (Tr. 69-71, 100, 123-125). Castiglione entered the elevator and pressed the button for the tenth floor. When the elevator stopped at the tenth floor Castiglione got out and walked down the corridor. He turned left into the corridor where Room 1005 was located. Castiglione apparently noticed that three agents had followed him out of the elevator. When he looked around, appearing to be nervous, he was placed under arrest. The "Lancel" suitcase which he was carrying was seized and found to contain 23 clear plastic bags filled with heroin (Tr. 22-34, 85-88, 92).

Special Agents Gill, Pavlick, O'Neill and State Police Officer Pinto then walked down the corridor to Room 1005 where they placed Rizzuto under arrest. Rizzuto was alone in Room 1005, which contained two beds, neither of which appeared to have been used. In the room was a suitcase filled only with paper towels. Special Agent Gill testified that no women had been observed going into Rizzuto's room that day (Tr. 34-37, 92-95, 86-88).

Rizzuto stipulated that the suitcase contained 14,190 grams or approximately 30 pounds of heroin hydrochloride (Tr. 88-89).

B. The Defense Case

Both Rizzuto and his wife testified. Mrs. Rizzuto said that at about 8:30 A.M. on the morning of May 9, 1972 Castiglione, whom she knew to be her husband's friend, had called. She handed the telephone to her husband and left the apartment alone at about 9:00 A.M. She characterized her husband as "a good-time Charlie" because he was always lending his BMW to people. She said that he was a presser but that it was seasonal work and that he had last worked in February 1972. She also said that they rented their apartment for \$90 a month (Tr. 134-143).

Through an interpreter Rizzuto testified that Castiglione had called him on the morning of May 9th and told him that he could procure a beautiful girl for him and that he should meet Castiglione at the Sheraton Motor Inn at about noon on the same day (Tr. 147-148). Rizzuto said that he had met Castiglione while playing cards at The Cafe Etna about two years earlier, but had never had any business dealings with him nor had Castiglione ever previously offered to set him up with a girl although they had discussed the possibility of such a rendezvous prior to May 9 (Tr. 144, 147-148). Rizzuto said he did not know who was to pay for the girl's services or how much she would charge or whether Castiglione was going to pay for his room. Rizzuto admitted that he had \$130 in cash in his pocket but claimed that he had won this money at cards (Tr. 142, 156, 157-158). Rizzuto also stated that he was thirty-seven years old, lived with his wife Maria and was not desperate for a woman (Tr. 157-159, 164-165). Rizzuto said that he owned a 1968 automobile which he frequently lent to others, including Castiglione, and that he never asked what Castiglione did with his car. He

specifically recalled lending it to Castiglione two or three days before May 9 (Tr. 147, 155).

Rizzuto testified that on the morning of May 9, at approximately 11:00 A.M. he left his apartment and took a large empty blue suitcase with him to his car. He drove a few blocks to a supermarket where it occurred to him that it would not be wise for him to enter a hotel with an empty suitcase. He went into the supermarket, purchased seven rolls of paper towels, returned to his car and drove home. He then carried the empty suitcase and the package of paper towels upstairs to his apartment on the fourth floor and placed the paper towels in the suitcase. He then carried the suitcase to his car, drove to the Sheraton Motor Inn and, at about noon, registered in Room 1005 under the name Vincenzo Columba. Rizzuto said that no one had ever specifically told him that he needed to have luggage when he went to a hotel but he thought the hotel's employees might be suspicious. He further testified that he registered under an assumed name because as a married man he feared detection (Tr. 148-150, 160-163). Rizzuto testified that twice during the day he had visited Castiglione's room, that he had spent one to two hours talking about the girls and had a snack, and that he waited in his room watching television in bed until about 9:30 that evening when he was arrested. Rizzuto said that Castiglione had not come to his room and that the only reason he had gone to the Sheraton was to enjoy the favors of the girls which Castiglione had promised (Tr. 150-153, 146). Rizzuto also stated that at that time he was receiving \$75.00 each week from unemployment insurance with which he supported his wife and two children.

Rizzuto also testified that he had never heard of Santo Mendolia or Guido Orsini prior to his arrest (Tr. 156-157).

ARGUMENT

The evidence was more than sufficient to convict Rizzuto.

The testimony of French Police Officer Claude Chaminadas undoubtedly proved the existence of a narcotics importation conspiracy.

Pursuant to telephone instructions from Orsini and Mendolia, Chaminadas met on May 2nd and 3rd with Vito Adamo and on May 8th and 9th with Anthony Castiglione. Castiglione and Adamo had had no direct communication with Chaminadas. Thus, it is reasonable to infer that they learned of each rendezvous from Orsini and Mendolia who had arranged them with Chaminadas. In addition, Castiglione and Adamo knew the exact amount of money necessary to purchase the 13 kilos of heroin from Chaminadas. Moreover, Orsini and Mendolia obviously knew that Chaminadas had 13 kilos of heroin although Chaminadas testified that he had never specifically told that to either Orsini or Mendolia. On May 9, Castiglione had received a telephone call from Orsini in the presence of Chaminadas. Orsini, whose voice was by then well known to Chaminadas, told Chaminadas that Castiglione was so anxious to show good faith that he would put \$20,000 of his own money.

The existence of the conspiracy having been clearly established, only slight additional proof is necessary to link an additional conspirator to the scheme. *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, — U.S. — (1974); *United States v. Gimelstob*, 475 F.2d 157 (3d Cir.), *cert. denied*, 414 U.S. 828 (1973); *United States v. McGann*, 431 F.2d 1104 (5th Cir. 1970). The proof that Rizzuto knowingly participated in the conspiracy far exceeded the level necessary for the trier of fact to conclude beyond a reasonable doubt that Rizzuto was a member.

On the day that the 13 kilos of heroin were to be transferred by Chaminadas to the buyers for \$130,000, Rizzuto registered at about noontime under an assumed name in the hotel where the multi-step transaction was to take place.* He remained there for some nine hours meeting with Castiglione at times conspicuously related to the unfolding events of the heroin delivery. One such occasion was when Castiglione, who was separately registered on the 15th floor, was seen 10 feet away from Rizzuto's room on the 10th floor carrying away the satchel containing the money then delivered to Chaminadas. From this one might reasonably infer that Rizzuto had brought or had served as a conduit for the money for the deal to the hotel. Even more damaging was the combined fact that Castiglione was arrested in possession of the heroin again on the 10th floor of the hotel apparently en route to Rizzuto's room, where Rizzuto awaited with a substitute suitcase which had been brought into the hotel by him stuffed with easily disposable and untraceable ballast (paper towels).

Even were the above circumstantial evidence standing alone deemed insufficient to support Judge Brieant's conclusion of Rizzuto's guilt, any deficiency in proof was overwhelmingly made up for by the blatantly perjurious story told on the defense case by Rizzuto. Such defense testimony may properly be considered in assessing the sufficiency of the evidence on appeal. *United States v. Tramunti*, slip op. 4811, 4813-14, — F.2d — (2d Cir. July 12, 1974). After extensively reviewing Rizzuto's testimony in the light of Rizzuto's personal background and depressed financial situation, Judge Brieant rejected as totally false the contention that Rizzuto's presence in the hotel over a nine hour span had been to await a poorly

* Rizzuto's car was also used by Castiglione on the evening of May 2 when Chaminadas met with Adamo who subsequently met with Castiglione.

planned and indefinite assignation with an unknown woman allegedly arranged by a friend (Castiglione) then indisputably in the midst of a major heroin purchase (21a-28a). Moreover, this attempted defense was precisely the cover-up plan divulged by Castiglione to Chaminadas on the day of the transaction. Castiglione specifically told the Frenchman that Castiglione would pick up the money from a friend in the hotel who was presenting the appearance of being there with a woman. Given the court's proper rejection of Rizzuto's narrative, it was free to draw the damaging inferences of Rizzuto's participation from the observations of the agents and the testimony of Chaminadas.

CONCLUSION

The judgment of conviction should be affirmed.

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BARBARA ANN ROWAN,
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* Page 27 of Judge Brieant's opinion, omitted from defendant's Appendix is attached hereto as Government Appendix B.

APPENDIX

APPENDIX A

(Indictment)

72 Cr. 1014

(Conspiracy to distribute and possess with intent
to distribute narcotic drug.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—v.—

ANTHONY CASTIGLIONE, CAMILLO RIZZUTO, VITO ADAMO,
GUIDO ORSINI and SANTO MENDOLIA,
Defendants.

The Grand Jury charges:

1. From on or about the 1st day of April, 1972 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere

ANTHONY CASTIGLIONE, CAMILLO RIZZUTO,
VITO ADAMO, GUIDO ORSINI and SANTO
MENDOLIA,

the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

APPENDIX A (Indictment)

2. It was part of said conspiracy that the said defendant unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about May 1, 1972 VITO ADAMO met with ANTHONY CASTIGLIONE.

2. On or about May 2, 1972 GUIDO ORSINI and SANTO MENDOLIA conversed, by telephone, with a person in New York City.

3. On or about May 2, 1972 VITO ADAMO had a conversation with a person.

4. On or about May 8, 1972 GUIDO ORSINI and SANTO MENDOLIA conversed, by telephone, with a person in New York City.

5. May 8, 1972, CASTIGLIONE possessed approximately 1 oz. of heroin hydrochloride.

6. May 8, 1972, RIZZUTO rented a room at Sheraton Motor Inn under the name of Vincenzo Consuelo.

7. May 9, 1972, CASTIGLIONE rented a room at Sheraton Motor Inn.

APPENDIX A (Indictment)

8. May 9, 1972, CASTIGLIONE and RIZZUTO had a conversation.

9. May 9, 1972, CASTIGLIONE had a conversation with a person.

(Title 21, United States Code, Section 846).

SECOND COUNT

The Grand Jury further charges:

On or about the 9th day of May, 1972 in the Southern District of New York,

ANTHONY CASTIGLIONE and CAMILLO RIZZUTO,

the defendants, unlawfully, intentionally and knowingly did possess with intent to distribute, a Schedule I narcotic drug controlled substance, to wit, approximately 13 kilos of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).) (Title 18, United States Code, Section 2.)

.....
Foreman

.....
WHITNEY NORTH SEYMOUR, JR.
United States Attorney

APPENDIX B**(Findings of Fact and Conclusions of Law)**

* * * * *

I also find beyond a reasonable doubt that Castiglione committed the substantive crime charged in Count 2 in furtherance of the conspiracy. He was arrested on the 10th floor of the Sheraton with 13 kilos of heroin in his possession. Since the acts of one co-conspirator in furtherance of the conspiracy may be attributed to his confederates while they remain members of the conspiracy. I also find beyond a reasonable doubt Rizzuto guilty on Count 2. *Pinkerton v. United States*, 328 U.S. 640, 645-48 (1946); *United States v. Castellana*, 349 F.2d 264, 278 (2d Cir. 1965), *cert. denied*, 383 U.S. 928 (1966).

The foregoing constitutes findings of fact and conclusions of law pursuant to Rule 32, F.R.Crim.P.

Dated: New York, New York
March 19, 1974

CHARLES L. BRIEANT, JR.
U. S. D. J.

